Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

T. M. VISWANATHAN --- PETITIONER

VS.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Tenkasi M. Viswanathan, Pro Se
7405 Alcoa Way
Wilmington NC 28405
Tel: 910-686-5395

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QUESTIONS PRESENTED

1. Where academic freedom is a vested legal right under North Carolina laws guaranteed to all academic staff of a (four-year) university and academic freedom includes in its ambit research and publication, can it be said that such matters are not of public interest and so not covered by the First Amendment to the United States Constitution without compromising the constitutional guarantees provided therein?

2. What are the "constitutional dimensions of delay" in due process requirements that should be stated in a complaint to assert a claim that one was deprived of property or/and liberty without the process that was due to him?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

T. M. VISWANATHAN,

Plaintiff-Appellant;

THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS; C.D. SPANGLER, JR in his official capacity; THE FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES; Dr. JESSE WILLIAMS in his official and individual capacity; Dr. LLOYD V. HACKLEY in his official and individual capacity; Dr. LEO EDWARDS in His official and individual capacity,; Dr. JON YOUNG in his official and individual capacity; Dr. MORRIS BLOUNT, in his official and individual capacity; Dr. JOSEPH MONROE in his official and individual capacity; Dr. CLARENCE WHITE, in his official

and individual capacity; KAYE WEBB, in her official and individual capacity; and Dr. FELTON THOMAS in his individual and official capacity

Defendants-Appellees.

This petition is not being submitted by or on behalf of any corporation, and there is no parent or subsidiary company to be listed by the petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

PETITION FOR WRIT OF CERTIORATRI

Tenkasi M. Viswanathan, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A at page A-1 to the petition and is unpublished. The opinion was entered on September 3, 1996.

The Order and Memorandum of the United States District Court for the Middle District of North Carolina granting defendants' Motion to Dismiss were entered on March 1, 1996. They appear in Appendix B at pages A-4 and A-5

respectively. Petitioner-plaintiff's motion to make additional findings and amend or alter the Order and the Memorandum was denied by order filed on April 23, 1996 stating that the District "Court lacke[d] jurisdiction to rule on Plaintiff's Combined Motion Under Rules 52(b) and 59(e) [of the Federal Rules of Civil Procedure]." The April 23, 1996 order appears in Appendix C at A-51. No publication on this case has been reported.

The three administrative Decisions of The University of North Carolina appear in Appendix B at A-27, A-29; A-34, A-35; and A-44, and A-46 respectively. The Decision by the Fayetteville State University Board of Trustees appears in Appendix B at A-42.

JURISDICTION

The date on which the United States Court of Appeals decided the case was September 3, 1996. Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C., Section 1254(1).

The jurisdiction of the Supreme Court of the United States to review the Orders in question by writ of certiorari is conferred by Rule 10.(c) of the Rules of the Supreme Court of the United States:

MATTERS OF ACADEMIC FREEDOM

This case involves a question on academic freedom of university faculty members that is secured by state law and regulations. Under these regulations research and publication and matters of concern and inquiry into knowledge are included in academic freedom and academic freedom is secured and guaranteed as a matter of law as an essential condition for faculty members to discharge their duties. Under these circumstances, the decision of the Fourth Circuit Court of Appeals affirming the District Court's finding that concern about research and publication are not of public concern conflicts with relevant decisions of this Court. This Supreme Court has already decided this question in Keyishian v. Board of Regents, 385 U.S. 589, 603 (academic freedom is of transcendent value) cited in Board of Regents

of State Colleges et al. v. Roth, 408 U.S. 564 at 582, 92 S.Ct. 2701, 2703; in Sweezy v. New Hampshire, 354 U.S. 234, 261-262 (Mr. Justice Frankfurter concurring in result) (research is for society's good and in the interest of wise government), cited in Roth at 408 U.S. 564 at 581; and in Meyer V. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct.625, 627, 67 L.Ed.2d 1042 (1922/23) (freedom to engage in the profession of a teacher and to exercise what is essential to that profession is a liberty right). Any liberty interest is a matter of public concern. This is particularly so, when there is a regulation that guarantees this interest.

Moreover, the United States Court of Appeals for the Seventh Circuit has made decisions on this question in ways that conflict with the decision of the Fourth Circuit Court of Appeals. In Bone v. City of Lafayette, 763 F.2d 295, 298 (7th Cir. 1985), the Circuit Court held that liberty interest includes the general freedom to take advantage of such opportunities as may arise in one's occupation. Please see also Lawson v. Sheriff of Tippecanoe County, 725 F.2d

1136, 1138 (7th Cir. 1984). Academic freedom including questions and concerns on research, publication and the like is such an opportunity, which is further secured by the state as an essential condition of the profession of university teaching. Any such liberty needs to be jealously guarded and so is a matter of public concern.

WHEN DOES DELAY CONSTITUTE A CLAIM?

This case provides the Court with an opportunity to define the "constitutional dimensions of delay" that should be stated in a complaint to survive a motion to dismiss? This case started in February, 1990 and the final administrative decision was made only in September, 1994. During the four and one-half years of its course, the case followed a tortuous path going through one judicial review (Appendix B at A-38), three administrative reviews by the Respondent University of North Carolina Board of Governors ("UNC Board" or "UNC Board of Governors" hereinafter), a hearing before the Respondent Fayetteville State University Board of

Trustees ("FSU Trustees"), and two hearings before the Fayetteville State University ("FSU" hereinafter) Hearing and Reconsideration Committee. Please see Appendix B at A-29, A-35, A-44, and A-42. When all of it was done, Petitioner did not get the process that was his due. The two lower courts did not consider plaintiff's claim that this delay and the due process that was finally given to Petitioner did not meet constitutional standard under the Fourteenth Amendment. The decision of the two lower courts to consider this question does not comport with the "constitutional dimensions of delay" set out in this Court's decision in Barry v. Barchi, 443 U.S. 55, 66 (1979) ("At some point, a delay in the post-termination hearing would become a constitutional violation."), cited in Loudermill, 470 U.S. at 547, 105 S.Ct. at 1496. See also Mathews v. Eldridge, 424 U.S. 319, 340, 342, 96 S.Ct., 893, 905, 906, 47 L.Ed.2d 18 (1976); Fusari v. Steinberg, 419 U.S.379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975). Both Mathews and Fusari discuss constitutional dimensions of delay between first and

second stage hearings. "Too much postponement for too long will be a violation regardless of the adequacy of the first stage hearing. The Supreme Court said as much in Loudermill.", citing Cleveland Board of education v. Loudermill, 470 U.S. 532, 541, 547, 105 S.Ct. 1487, 1496, 84 L.Ed.2d 495 (1985). Quoted from D'Acquisto v. Washington, 640 F.Supp. 594, 618 (N.D. Ill.). Even though this Court has dealt with this problem in the above cases at "the proof stage of the claim", it has not explicitly dealt with the question of what are the elements of such a claim to survive a motion to dismiss.

THE 1991 AMENDMENT TO 42 U.S.C SECTION 1981 AND COLOR OF STATE LAW

This Court decided in 1989 in Jett v Dallas Independent School District, 491 U.S. 701 (1989) that when State actors are involved, 42 U.S.C., Section 1983 was intended to be the exclusive federal remedy for violation of rights guaranteed under 42 U.S.C., Section 1981. However, in the year 1991, Congress amended Section 1981 and has

brought that section more in line with Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq.) as amended in 1970. "Impairment under color of State law" is part of the text of the amended act. Moreover, the amendment includes both "impairment by governmental discrimination and impairment under color of State law." Appendix F at A-86. This Court has not decided this question after the 1991 amendment. After the amendment, Section 1981 takes the character and color of Section 1985 as well as Title VII of the Civil Rights Act as amended in 1970. Section 2 of Pub.L. 102-166 authorizing the amendment stated:

The Congress finds that ---

(1) "additional remedies under Federal Law are needed to deter unlawful harassment and intentional discrimination in the workplace;
(2) . . .
(3) "legislation is necessary to provide additional protections against unlawful discrimination in employment."

Moreover, Petitioner has proceeded pro se and has never had any opportunity to conduct any discovery related to the case, as the regulations do not provide for depositions,

interrogatories or other forms of discovery. Thus in spite of the fact that the case has ran its course over a period of five and one-half years, there has not been any discovery at all. The dismissal means also the loss of an opportunity even to litigate. Would such a dismissal be just under the tortuous circumstances of this case? The lower courts have applied a very harsh standard.

These important questions of federal law have not been, but should be, settled by the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition involves Constitutional Amendment One, the Due Process Clause of the Fourteenth Amendment, and applications of these provisions under 42 U.S.C., Section 1983. Appendix F at A-88. The case involves claims under 42 U.S.C., Section 1981, 1985, 1986 as well as 2000e et seq. Petitioner appeals to the regulations in The Code of The University of North Carolina, (Appendix E) and those in the

Tenure Policies and Regulations of Fayetteville State University. (Appendix D)

STATEMENT OF THE CASE

Petitioner Viswanathan was Plaintiff-Appellant before the United States Court of Appeals for the Fourth Circuit. Petitioner (Plaintiff) was appointed during the academic year 1989-90 to a tenure-track position as an Associate Professor to the faculty of the Department of Mathematics and Computer Science of Fayetteville State University (FSU hereinafter). Fayetteville State University is one of the 16 constituent institutions of The University of North Carolina. By letter dated February 8, 1990, he was given timely notice that he would not be reappointed to a second one-year term. Even though Viswanathan was holding a probationary appointment, the fact that he was an associate professor entitled him to the "incidents of academic tenure" designed to protect academic freedom in constituent institutions of The UNC. The regulations state as follows in **Section 604 B.** under the heading "**Impermissible Reasons for**

Nonreappointment" of faculty members on probationary appointments (Appendix E at A-83):

> **In** no event shall a decision not to reappoint a faculty member be based upon (a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North Carolina Constitution, or (b) discrimination based upon the faculty member's race, sex, religion, or national origin; or (c) personal malice.

Please see also Section 5.A of the FSU Tenure Policies and Regulations ("FSU Tenure Policies" hereinafter). The section is entitled" **NONREAPPOINTMENT" OF FACULTY MEMBERS ON PROBATIONARY APPOINTMENTS,** and it provides the procedural due process that is applicable, when the decision not to reappoint is contested. Appendix D at A-66. Section 3.C.(2) of the FSU Tenure Policies regulates how a "Decision Not to Reappoint Upon Expiration of Probationary Terms" should be made. Appendix D at A-63. The regulations define the channel for academic review at A-62. The regulations also use the term "chairman" in a generic way; "chairman" could mean "Dean [of a college or

school]", or the "Vice Chancellor for Academic Affairs". Similarly, "Department" could mean "College", "School", or "the Division of Academic Affairs". Appendix D at A-61. In order to guarantee academic freedom, the regulations under Section 5 require that the decision not to reappoint be pinned on a single academic officer, who should also be the first such officer making the first decision not to reappoint in the channel for administrative review. Under the regulations in Appendix D at A-64, the decision not to reappoint is final, "except as it may be later reviewed in accordance with the provisions of Section 5." Appendix D at A-64.

If the Chancellor makes the final decision, then the internal campus review process in Section 5 of the FSU Tenure Policies will not be applicable. In such a case, a direct appeal to the UNC Board would lie under Section 501 C(4) of The Code of The University of North Carolina. This direct appeal is in Appendix E at A-75. Please see footnote 6 in Section 5 of the FSU Tenure Policies, Appendix D at A-67.

The 1990 decision of FSU not to reappoint Petitioner was made by Respondent Dr. Joseph Monroe, then Vice Chancellor for Academic Affairs at FSU. Petitioner stated in paragraph 51(a)(1) of his Complaint that "[i]n the early fall of 1989, [he] made statements at several meetings of the faculty which were quite critical of the academic administration at FSU." He also stated in paragraph 51(a)(6) that "[o]n December 4, 1989, at a faculty meeting with the Chancellor, [he] publically criticized Dr. Monroe for failing to emphasize publication and research."

Petitioner contested the 1990 nonreappointment decision of Respondent Monroe alleging that Dr. Monroe's decision was retaliation for the exercise of his rights guaranteed by the First Amendment to the U.S. Constitution or Article 1 of North Carolina's Constitution. Petitioner also contested that Dr. Monroe's decision was based on personal malice. Petitioner followed the procedures in Section 5 of the FSU Tenure Policies and appealed to the FSU Hearing and Reconsideration Committee, which reported that

Petitioner had "adequately supported his contentions regarding the reasons [personal malice and retaliation for exercise of First Amendment rights] for his non-reappointment." The Committee recommended that the non-renewal decision be reversed." Respondent Hackley did not accept the recommendation and Petitioner then appealed to the FSU Trustees and the UNC Board. The UNC Board stated as follows in its report (paragraph 52, Complaint):

> The evidence presented tends to show that the negative recommendation of the Vice Chancellor could have been based in part on Professor Viswanathan's critical remarks. Because the remarks appear to be protected speech, this possible motivation on the Vice Chancellor's part would violate the First Amendment to the U.S. Constitution.

The UNC Board ordered the following remedy (paragraph 53, complaint):

> An appropriate remedy in cases where a nonreappointment decision is based on an impermissible reason is to conduct a new review of the faculty member's credentials. Such a review should be removed from the prior taint, but should also allow the institution an opportunity to consider the current credentials of the faculty member. To accomplish these ends, the Committee recommends that the nonreappointment decision be reversed.

The UNC Board reversed the 1990 FSU decision on or about September 13, 1991. Soon after, Petitioner made the request for reappointment to his original position at FSU. Paragraph 81, Complaint. Respondents Blount, Young, Edwards, and Hackley did not conduct the new review ordered by the UNC Board (Paragraph 82, Complaint). Interpreting the rule in Appendix D at A-59, A-60 of the FSU Tenure Policies, Petitioner contended that FSU should have made a decision on the reappointment by February 15, 1992 and that he was entitled for an automatic reappointment under the said regulation.

In the absence of any initiative from FSU, Petitioner made a second appeal to the UNC Board. The UNC prescribed May 8, 1992 as a deadline. FSU conducted the review and on or about March 20, 1992, the Department Chairman, Respondent Blount approved Petitioner's reappointment. Paragraph 84, Complaint.

On May 6, 1992, FSU announced that FSU would not reappoint Petitioner. Paragraph 88, Complaint. Petitioner

then asserted that "important procedures" in Sections 5 of the FSU Tenure policies were not followed. Paragraph 98, Complaint. Dissatisfied with the FSU 1992 decision, he "had to seek a judicial review of the 1992 decision of FSU and the UNC Board, pursuant to N.C.G.S., Section 150B-45. Paragraph 100, complaint. This "court order became necessary to initiate review under Section 5 [of the FSU Tenure Policies]." Paragraph 98, Complaint. He also alleged that the 1992 "review for reappointment was not 'initiated at the department level'" as ordered by the UNC Board through its Order of September 13, 1991. Paragraph 99, Complaint.

After the judicial review under N.C.G.S., Section 150B-45, and the court order resulting therefrom, the review under Section 5 of the FSU Tenure Policies was 'initiated after a year's break in March, 1993." Paragraph 98, Complaint. The FSU Hearing Committee did not give a timely review under Section 5.D of the FSU Tenure Policies, even after the Court order. Paragraph 98, Complaint.

The 1992 non-reappointment decision was made by respondent Jon Young. Viswanathan alleged impermissible reasons for the nonreappointment decision. A hearing took place and in July, 1993, the FSU Hearing and Reconsideration Committee found that "the 1992-nonreappoitment decision of Dr. Jon Young, Acting dean of the College of Arts and Sciences (CAS) was based upon the impermissible reasons of personal malice, of plaintiff Viswanathan's exercise of rights guaranteed by the First Amendment to the United States Constitution, and of discrimination based on national origin." Paragraph 101, Complaint.

When the Section 5 review of the 1992 decision was undertaken after the court order (Appendix B at A-38), the procedure in Section 5.G. of the FSU Tenure Policies was not followed. Paragraphs 105, 106, 107 , and 98 of the Complaint. The regulation under Section 5.G. required that respondent Young manifest himself in writing, based on the recommendation of the FSU Hearing Committee, as to what

modification he would make as to his original decision not to reappoint. Appendix D at A-73. It is always his decision that should be reviewed, keeping the impermissible reasons on focus. The Chancellor or any other officer is prohibited from speaking on his behalf.

After the July, 1993 decision of the FSU Hearing and Reconsideration Committee, FSU made yet another administrative decision by the FSU Chancellor. Paragraph 114, Complaint. Under the FSU regulations, the FSU Chancellor as an executive officer has no appellate jurisdiction . He only serves as a medium of communication between the Hearing Committee and the FSU Trustees. Section 502.C.(4), The Code. Appendix E at A-76 The regulations accord great preeminence to academic freedom. They require that the non-reappointment decision be that of a single administrative officer. There is no shared responsibility for a nonreappoitment decision of a faculty member at FSU.

The review process died with a letter that Respondent Hackley wrote on or about August 2, 1993. Paragraph 114, Complaint.

Petitioner alleged serious violations and continued the appellate process. The process continued with the FSU Trustees (October 5, 1993 at A-42). The UNC Board made its final decision on or about September 9, 1994. Appendix B at A-46.

Plaintiff filed suit immediately on or about September 13, 1994 in U.S. District Court for the Middle District of North Carolina. Plaintiff asserted that he had a right for the review under Section 5 and that he did not get the process that was his due. Paragraphs 117, and 122, Complaint.

He alleged that the 1990 nonreappointment decision of respondent Monroe was retaliation for the exercise of his First Amendment rights of free speech. Paragraphs 51, 76, and 80, Complaint.

In Paragraphs 118, 121, Petitioner asserted that Petitioning the properly constituted authorities is a First

Amendment right and that the nonreappointment decision and the inordinate delay were acts of retaliation for the exercise of these first amendment rights. He also made the necessary connection to 42 U.S.C., Section 1983 in stating these claims.

Petitioner also asserted an Equal Protection Claim under the Fourteenth Amendment stating that the second review created a discriminatory class to which he was assigned. The facts about the second review concerning the February 15, 1992 date created a class that was in violation of the Equal Protection Clause of the Fourteenth Amendment. Paragraphs 56, 57, 58, and 128. Complaint.

In paragraph 58, petitioner stated that "[t]he rights to lawful proceedings and to the enjoyment of the benefits of his contract are secured to him by Section 42, U.S.C., Section 1981." And named several defendants. He also stated the defendants discriminated against him on the basis of his alien status. Plaintiff is an alien and a citizen of India, Paragraphs 1 through 3 and 16, Complaint. The Complaint asserted

jurisdiction for this claim under 28 U.S.C. Sections 1331, 1343(a)(3, 4).

Petitioner also made several statements about the connection between this case and the related case of Viswanathan v. Scotland County Board of Education et al., Case No. 96-5555, Supreme Court, pending before this court. He suggested conspiracy. Paragraphs 62 through 97. There was no discovery that involved the Respondents in this case. State regulations do not provide for one.

Petitioner also stated a claim based on delay in paragraphs 59, 60, 61, 82, 121, 122, 98, 100,

REASONS FOR GRANTING THE PETITION

The Petitioner presents the following:

FIRST AMENDMENT CLAIM UNDER SECTION 1983

In Meyer V. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct.625, 627 (1922), the Supreme Court of the United States stated:

> The American People have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The ordinance of 1787 declares:
>
> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Meyer Court stated further as follows (43 S.Ct. 627):

> Practically, education of the young is only possible in schools conducted by **especially qualified persons who devote themselves thereto**. The calling always has been regarded as useful and honorable, **essential, indeed, to the public welfare**.
>
> (Emphasis added.)

In the instant case, Petitioner was an Associate Professor on tenure track at Fayetteville State University. Academic freedom is a vested legal right guaranteed by law and regulation as a condition essential to a faculty member's discharge of his duties at Fayetteville State University. Moreover, protection is guaranteed as a matter of North Carolina law, when the matter pertains to academic freedom and academic freedom is exercised "in the lawful pursuit of [one's] respective area of scholarly and professional interest

and responsibility." FSU Tenure Policies and Regulations, Section 1, recites as follows (Appendix B at A-54):

> Fayetteville State University is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. This institution, therefore, supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, **research**, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.
>
> Fayetteville State University shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.
>
> (Emphasis added)

Section 2., entitled, "**Academic Freedom and Responsibility of Faculty, Tenure Policies and Regulations of Fayetteville State University** (Appendix D at A-55) provides further guarantees

Research and publication are included explicitly as important components of academic freedom essential for "transmission and advancement of knowledge and understanding." North Carolina law only echoes the

"supreme importance" of the "acquisition of knowledge" and the need to promote it as set out by the Meyer Court, supra. Please see also The Code of The UNC at Appendix E at A-77, A-78, and A-81.

To hold that research in a constituent institution of the University of North Carolina is not a matter of public importance is to hold that academic freedom is not a matter of public importance or that North Carolina law that guarantees such academic freedom is not of public importance. Such a holding is contrary to the fundamental aspirations of the American People set out in Keyishian v. Board of Regents, 385 U.S. 589, 603 (**one-year term contract**), cited in Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564 at 582:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

The importance of research and the constitutional theory behind it are stated by Mr. Justice Frankfurter in Sweezy v.

New Hampshire, 354 U.S. 234, 261-262 (concurring in result), cited in Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564 at 581:

> For **society's good** --- if understanding be an essential need of society --- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."

The right inquiry is a finding if Petitioner's remarks on research and publication fall within the purview of academic freedom and if so they were made "in the lawful pursuit of [petitioner's] area of scholarly and professional interest and responsibility." The complaint is not the place that should provide this finding. It is properly a matter that should be proved by expert witnesses and/or by the record. Moreover, this is a matter that calls for the expertise of academic personnel including the faculty. The District Court cannot decide at this early stage of the case that the matter is not one of academic freedom. Moreover, plaintiff has asked for a jury trial, and it is for the jury to decide if the matter falls within the ambit of academic freedom, exercised "in the

lawful pursuit of [petitioner's] area of scholarly and professional interest and responsibility." Such an inquiry is outside the scope of a Rule 12(b) motion to dismiss.

PRIOR ADMINISTRATIVE HEARINGS

The findings of a prior administrative hearing are "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In Petitioner's case, there was not one, but two such hearings by The Board of Governors of the University of North Carolina, and again two such hearings by the FSU faculty Committee. Appendix B at A-27, and A-44Their findings are relevant: Please see also Sindermann v. Perry, 430 F.2d 939, 944, 945 (CA 5),

The findings by the Board and the FSU Hearing and Reconsideration Committee raise a presumption that the critical remarks of Petitioner fall within the purview of "academic freedom" and hence protected as a matter of the cited university regulation in Appendix D at A-54, and A-55

Such a presumption raises a genuine issue and so properly states a cognizable claim under the First Amendment.

DUE PROCESS

In Armstrong v. Manzo, 380 U.S. 545, 552 (1965), the Supreme Court stated that the hearing required by the Due Process Clause must take place "at a meaningful time and in a meaningful manner." Please see Grannis v Ordean, 234 U.S. 385, 394 (1914). The instant case is unlike Board of Regents v. Roth, 408 U.S., 564, 567, 92 S.Ct. 2701, 2703 where "[s]tate law thus clearly [left] the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials." In the instant case, the decision is fettered by the operation of three impermissible reasons. Under Logan, Petitioner had protected property interests in the administrative hearing under Section 5 of the FSU Tenure Policies and Regulations. Please see Appendix D at A-66.

Like the Illinois Fair Employment Practice Act (FEPA) in Logan v. Zimmerman Brush Co., 455 U.S., 422,

424, the Code of the University of North Carolina and the Tenure Policies and Regulations of Fayetteville State University bar employment discrimination on the basis of race, national origin, sex, religion, and age. Like the FEPA, the regulations also establish a comprehensive scheme for adjudicating contentions of discrimination. There are also two other impermissible reasons. Appendix D at A-66, A-67. Viswanathan had a property right to these adjudicatory proceedings under Logan, 455 U.S. at 428, 429, 430 and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). All the process that is due to Viswanathan is provided in Section 5 of the FSU Tenure Policies and Regulations (Appendix at A-66) The hearing that was provided was not under Section 5 and so is not meaningful under the Due Process Clause.

DELAY CONSTITUTES A CLAIM

"At some point, a delay in the post-termination hearing would become a constitutional violation." Barry v. Barchi, 443 U.S. 55, 66 (1979), cited in Loudermill, 470

U.S. at 547, 105 S.Ct. at 1496. See also Mathews v. Eldridge, 424 U.S. 319, 340, 342, 96 S.Ct., 893, 905, 906, 47 L.Ed.2d 18 (1976); Fusari v. Steinberg, 419 U.S.379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975). Both Mathews and Fusari discuss constitutional dimensions of delay between first and second stage hearings. "Too much postponement for too long will be a violation regardless of the adequacy of the first stage hearing. The Supreme Court said as much in Loudermill." D'Acquisto v. Washington, 640 F.Supp. 594, 618 (N.D. Ill.). Viswanathan was never provided due process inasmuch as his first hearing was nullified by the reversal of the 1990 nonreappointment decision of FSU. The process that was his due after the 1992 nonreappointment decision did not take place in 1992. The February 1993 order of the Superior Court of New Hanover County (Appendix B at A-38) gave him hope that finally he would be given the process that was his due. That also did not happen since the crucial Section 5.G. was not completed and after the hearing, the original decision of Jon Young was abandoned and a new

decision by Respondent Hackley took its place without Petitioner being aware that the process was being tampered. In Mathews, the Court said that one must consider the actual procedures used and 'the risk of an erroneous deprivation of [the private] interest through the procedures used." Identified as the second Eldridge heading, it called for an examination of the risk of deprivation through the use of wrong procedures. In Petitioner's case the process that was his due never took place.

CONCLUSION

Based on the foregoing considerations, the petition for a writ of certiorari should be granted.

Respectfully submitted this the 2 nd day of December, 1996.

T. M. Viswanathan

Tenkasi M. Viswanathan, Pro-se
7405 Alcoa Way
Wilmington NC 28405
Tel: 910-686-5395

Supreme Court, U.S.
FILED

96 900 DEC 2 1996

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

T. M. VISWANATHAN --- PETITIONER

VS.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Tenkasi M. Viswanathan, Pro Se
7405 Alcoa Way
Wilmington NC 28405
Tel: 910-686-5395

94 pp

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1443

T.M. VISWANATHAN,

Plaintiff-Appellant,

versus

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; C.D. SPANGLER, JR., in his official capacity, FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES; JESSE WILLIAMS, DR., in his official and individual capacity; LLOYD V. HACKLEY, DR., in his official and individual capacity; LEO EDWARDS, DR., in his official and individual capacity, JON YOUNG, DR., in his official and individual capacity, MORRIS BLOUNT, DR., in his official and individual capacity, JOSEPH MONROE, DR., in his official and individual capacity,

CLARENCE WHITE, DR., in his official and individual capacity, KAYE WEBB, in her official and individual capacity, and FELTON THOMAS, DR., in his individual and official capacity; ALL DEFENDANTS,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of North Carolina at Durham. Hiram H.Ward, Senior District Judge. (CA-94-528-1)

Submitted: August 22, 1996 Decided: September 3, 1996

Before HALL, WILLIAMS, and MICHAEL, Circuit Judges

Affirmed by unpublished per curiam opinion

T.M. Viswanathan, Appellant Pro Se. Thomas J. Ziko, Celia Grasty Jones, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

See Local Rule 36(c).

PER CURIAM:

Appellant appeals from the district court's orders granting Defendants' motion to dismiss and denying Appellant's motion for reconsideration. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Viswanathan v. Board of Governors, No. CA-94-528-1 (M.D.N.C. March 1 Section April 24, 1996). In light of the disposition of the appeal, we deny Appellant's motion to vacate order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

Case No. 1:94CV528

Docket Entry: 48
Filed March 1, 1996

Dr. TENKASI M. VISWANATHAN,)
Plaintiff,)
v.)
)
THE UNIVERSITY OF NORTH CAROLINA)
BOARD OF GOVERNORS, C.D. SPANGLER, JR)
in his official capacity, THE FAYETTEVILLE)
STATE UNIVERSITY BOARD OF TRUSTEES,)
Dr. JESSE WILLIAMS in his official and individual)
capacity, Dr. LLOYD V. HACKLEY in his official)
and individual capacity, Dr. LEO EDWARDS in)
His official and individual capacity, Dr. JON)
YOUNG in his official and individual capacity,)
Dr. MORRIS BLOUNT, in his official and)
individual capacity, Dr. JOSEPH MONROE in his)
official and individual capacity Dr. CLARENCE)
WHITE, in his official and individual capacity,)
KAYE WEBB, in her official and individual capacity,)
and Dr. FELTON THOMAS in his)
individual and official capacity,)
)
Defendants.)

JUDGMENT

For the reasons set forth in the memorandum opinion entered contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss be, and the same hereby is **GRANTED** and this action be dismissed.

(Sd.) Hiram H. Ward
United States District Judge

March 1, 1996

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

Case No. 1:94CV528

Docket Entry: 47
Filed March 1, 1996

Dr. TENKASI M. VISWANATHAN,)
Plaintiff,)
v.)

THE UNIVERSITY OF NORTH CAROLINA)
BOARD OF GOVERNORS, C.D. SPANGLER, JR)
in his official capacity, THE FAYETTEVILLE)
STATE UNIVERSITY BOARD OF TRUSTEES,)
Dr. JESSE WILLIAMS in his official and individual)
capacity, Dr. LLOYD V. HACKLEY in his official)
and individual capacity, Dr. LEO EDWARDS in)
His official and individual capacity, Dr. JON)
YOUNG in his official and individual capacity,)
Dr. MORRIS BLOUNT, in his official and)
individual capacity, Dr. JOSEPH MONROE in his)
official and individual capacity Dr. CLARENCE)
WHITE, in his official and individual capacity,)
KAYE WEBB, in her official and individual capacity,)
and Dr. FELTON THOMAS in his)
individual and official capacity,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

Ward, Senior Judge

This matter comes before the Court on defendants' Motion to Dismiss pursuant to Rule 12(b)6. For the reason stated herein, the Motion to Dismiss will be granted with respect to all claims and this entire action will be dismissed.

FACTS

For the purposes of this action, facts alleged by plaintiff will be taken as being true. Republican Party of North Carolina v. Martin, 980 F.2d 943 (4th Cir. 1992), cert denied, 114 S.Ct.93

(1993). Plaintiff is representing himself pro se and many of the facts alleged by plaintiff are convoluted and tangled. This court has spent a great deal of time and effort attempting to organize the facts in some type of coherent manner.

PARTIES

Plaintiff names a great many individuals as defendants and it will probably be helpful if a little time is spent sorting out the individual defendants and the positions they held during the time period addressed by plaintiff.

C.D. Spangler, Jr. was the President and executive officer for the University of North Carolina.

Dr. Jesse Williams was a member of the Fayetteville State University (hereinafter "FSU") Board of Trustees.

Dr. Lloyd Hackley was the Chancellor of FSU and the executive officer for the FSU Board of Trustees.

Dr. Leo Edwards was the Director of the Mathematics and Science Education Center at FSU from 1989 until 1991. Dr. Edwards was the Dean of the College of Arts and Sciences at FSU fro 1990 until 1991 and Dr. Edwards was the Vice Chancellor for Academic Affairs at FSU from 1991 until 1993.

Dr. Jon Young was the Chairman of the Department of Humanities for the College of Arts and Sciences from 1990 until 1991. Dr. Young was then the Dean of the College of Arts and Sciences from 1991 until 1993.

Dr Morris Blount was the Chairman for the Department of Mathematics and Computer Science.

Dr. Joseph Monroe was the Vice Chancellor for Academic Affairs at FSU from 1989 until 1991.

Dr. Clarence White was the Chairman of the FSU Hearing and Reconsideration Committee for 1991 until 1993.

Kaye Webb was legal counsel for Chancellor Hackley and FSU from 1989 until 1990 and from 1992 until 1993.

Dr. Felton Thomas was the Chairman of the FSU Hearing and Reconsideration Committee from 1989 until 1990.

With the sole exception of Spangler, plaintiff has named all of the above defendants in both their individual and official capacity.

FACTS

Plaintiff was appointed to a one-year position as an Associate Professor in the Department of Mathematics and Computer Science at FSU for the 1989-90 academic year. In the fall of 1989, plaintiff made statements at several faculty meetings which were highly critical of the academic administration at FSU. In October of 1989, the tenured faculty of the Department of Mathematics and Computer Science recommended that plaintiff be reappointed and the Department Chair for the Department of Mathematics and Computer Science recommended that plaintiff be reappointed. This

recommendation was approved by the Dean of the School of Arts and Sciences and forwarded to Vice Chancellor Joseph Monroe.

The FSU Committee on Tenure, Promotion and Reappointment recommended plaintiff's reappointment and also made factual findings. The Tenure Committee found that on December 4, 1989, plaintiff publicly criticized Mr. Monroe for failing to emphasize publication and research. Three days later, plaintiff was called into a conference with defendant Edwards and Blount and told that he needed to "adapt" to the situation at FSU. On January 29, 1990, defendant Monroe recommended that plaintiff not be reappointed due to plaintiff's "unhappiness" and his "serious problems of adjustment."

On February 8, 1989, plaintiff was given notice by letter that he would not be reappointed for second one-year term. Plaintiff appealed this decision to the FSU Hearing and Reconsideration Committee where it was recommended that plaintiff be reappointed for a second one-year term. Defendant Hackley declined to accept this recommendation.

Plaintiff then appealed to the FSU's Board of Trustees where defendant Hackley's decision was upheld. Next, plaintiff appealed to the Board of Governors of the University of North Carolina. The Board of Governors made findings of fact and recommended that plaintiff be allowed to request reappointment.

On September 28, 1991, plaintiff requested reappointment. Plaintiff heard nothing regarding his request so he appealed to the Board of Governors of UNC on February 15, 1992. The Board of Governors set a date of May 8, 1992 for a review of plaintiff's request for reappointment.

On March 20, 1992, plaintiff received a departmental recommendation for reappointment. However, on May 6, 1992, defendant Hackley decided not to reappoint plaintiff. Following this decision, plaintiff again appealed to the Hearing and Reconsideration Committee and was again recommended for reappointment. Defendant Hackley again rejected this recommendation.

Following this rejection, plaintiff appealed to the board of Governors for UNC where defendant Hackley's decision to not reappoint plaintiff was finally upheld.

Following this long and convoluted series of events, plaintiff filed this action alleging that a series of defendants violated several federal and state laws.

DISCUSSION

Defendant has moved to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A Rule 12(b)(6) motion should only be granted in very limited circumstances. Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). The Fourth Circuit has stated that "a motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." Id.

Based on Rogers, the question becomes whether the Complaint, taken in the light most favorable to plaintiff, states any valid claim for relief. In deciding whether a claim has

been stated, Rule 8 of the Federal Rules of Civil Procedure requires only "notice pleading" such that a defendant receives fair notice from the complaint of the claim and the grounds on which the claim rests. Conley v. Gibson, 355 U.S. 41 (1957).

Plaintiff's essential claim is that his one-year contract with FSU was not continued for a second year and this refusal by FSU to a second year contract violated plaintiff's constitutional rights. Plaintiff's claims will be addressed separately.

A. Plaintiff's 42 U.S.C. Section 1985 Claim

In order to state a claim under 42 U.S.C. Section 1985, plaintiff must allege: 1) a conspiracy by the defendants, 2) to deprive plaintiff of equal protection of the laws, that was 3) purposeful, with the intention to discriminate, and that 4) resulted in injury to person or property or deprivation of a right or privilege of citizenship. Griffin v. Breckenridge, 403 U.S. 88 (1971). For plaintiff to successfully allege a conspiracy, he must do more than merely state conclusory allegations. Id. at 102. Plaintiff must make specific factual averments showing

the direct participation of each defendant in the alleged conspiracy; who conspired; and how, when and where they conspired. Thompson v. Wise General Hospital, 707 F.Supp 849 (W.D. Va. 19890 aff'd, 896 F.2d 546, cert denied, 498 US 846 (1990).

A thorough reading of plaintiff's complaint finds no allegation of conspiracy. Plaintiff does not allege any specific acts of conspiracy. Instead, plaintiff seems to rely on innuendo when he insinuates that certain events occurred within a short time of each other. Relying on innuendo and insinuation is not sufficient to state a claim under 42 U.S.C Section 1985. Accordingly, plaintiff's claim for violation of 42 U.S.C. Section 1985 is dismissed with respect to all defendants.

B. Plaintiff's 42 U.S.C. Section 1986 Claim

Plaintiff claims that defendants violated 42 U.S.C. Section 1986 when they failed to prevent violations of 42 U.S.C. Section 1985. A claim under 42 U.S.C. Section 1986 can only be stated if the complaint states a valid claim under 42 U.S.C. Section 1985. McCalden v. California Library

Ass'n, 955 F.2d 1214 (9th Cir. 1990). As discussed above, plaintiff failed to state a claim for violation of 42 U.S.C. Section 1985. Therefore, plaintiff's Section 1986 claim must be dismissed. Accordingly, Defendants' Motion to Dismiss the claim for violation of 42 U.S.C. Section 1986 will be granted and these claims will be dismissed.

C. Plaintiff's 42 U.S.C. Section 1983 Claim - Property Right and Liberty Interest

Plaintiff claims that defendants' actions violated 42 U.S.C. Section 1983 in that plaintiff's constitutional rights were allegedly violated by defendants when plaintiff did not receive a second one- year contract. In order to have his constitutional rights violated, defendant must first be deprived of a constitutionally protected right. Thus, in order to invoke the Fourteenth Amendment's due process protection, plaintiff must allege that defendants deprived him of either a protected liberty or property right. Board of Regents v. Roth, 408 U.S. 564 (1972).

Plaintiff clearly acknowledges that he only had a one-year contract with FSU. It is well settled law that faculty members with single-year contracts do not have property rights in continued employment. Kilcoyne v. Morgan, 664 F.2d 940 (4th Cir. 1981), cert. denied 456 U.S. 928 (1982). Therefore, plaintiff did not have a property right in having his one-year contract renewed for a second year.

Since plaintiff did not have a property right in his continued employment, he must rely on a deprivation of a liberty interest to support his claim for violation of his due process. A liberty interest may be implicated in a termination of employment if the termination seriously affects the employee's standing and associations in his community or imposes a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities. Roth at 573. However, a decision to not reappoint does not implicate any liberty interest. Id. at 573.

Plaintiff might attempt to argue that his failure to be reappointed for a second year creates a stigma to his reputation

and that this stigma is sufficient to adversely affect his liberty interest in future employment. However, plaintiff fails to claim that he has been stigmatized or that he has been unable to obtain other employment. On the contrary, plaintiff states since his one-year contract expired with FSU, he has been employed as a teacher in the North Carolina state school system.

Plaintiff's sole claim to stigmatization is a claim that his reputation was "put in jeopardy" when he was not rehired for a second one-year period. However, reputation alone is insufficient to invoke the protection of the Due Process Clause and as such is not a protected liberty interest. Paul v. Davis, 424 U.S. 693 (1976) reh'g denied, 425 US 985 (1976). This does not leave plaintiff without recourse since damages to plaintiff's reputation are actionable under the common law claims for libel and slander. Siegert v. Gillery, 500 U.S. 226 (1991) reh'g denied, 501 US 1265 (1991).

Plaintiff did not have a property right in continued employment, nor was he denied any liberty interest; therefore,

his claims for violation of due process due to deprivation of a property or liberty interest in accord with 42 U.S.C. Section 1983 must be and will be dismissed.

D. Plaintiff's 42 U.S.C. Section 1983 Claim - First Amendment Free Speech Right

Plaintiff also claims that he was not rehired for a second year out of retaliation for making remarks critical of the FSU administration. In order to properly state a claim for retaliatory discharge under 42 U.S.C. Section 1983, plaintiff must satisfy a three-pronged test. Holland v. Rimmer, 25 F.3d 1251 (4th Cir. 1994). Plaintiff must show: 1) that "he engaged in speech on a matter of public concern", 2) "that the alleged retaliatory action deprived him of some valuable benefit" and 3) "a causal relationship between the protected speech and the retaliatory action, such that 'but for' the protected expression the employer would not have taken the alleged retaliatory action." Holland at 1254.

Plaintiff's comments regarding the FSU administration must be deemed to be of public concern in order for the second and third elements of retaliatory discharge to be addressed.

Plaintiff cannot satisfy the "public concern" requirement by simply alleging that his comments concerned disagreements between himself and FSU administrators because it has been established that complaints of personal grievances concerning an employee's employment are not matter of public concern and are not entitled to constitutional protection. Connick v. Myers, 461 U.S. 138 (1983).

Plaintiff asserts that he "made statements at several meetings of the faculty which were quite critical of the academic administration at FSU." Plaintiff does not specify the exact nature of these comments but from a reading of the complaint and the documents submitted by plaintiff it appears that he was concerned with FSU's requirements for the FSU faculty to publish. While this concern is undoubtedly of interest to the professors at FSU, it hardly seems to rise to the standard of public concern necessary to satisfy threshold requirements for First Amendment protection.

Plaintiff also asserts that he published an article in the Fayetteville Observer-Times on March 18, 1992 which dealt

with education issues of public concern. Although this article was published more that two years after plaintiff was notified that he would not be rehired for a second year, plaintiff somehow attempts to argue that he was not rehired as a result of this article. Barring some unknown powers of prognostication, it seems highly unlikely that an article published two years after the fact could have any effect on the decision not to rehire plaintiff for a second year.

Plaintiff has failed to satisfy the first element in his claim for retaliation in violation of the First Amendment. Plaintiff makes no assertions that could be interpreted as showing that he made any statements of public concern during the time period he was being considered for a second one-year contract. Since plaintiff has failed to allege that his comments were of public concern, he has failed to allege a violation of 42 U.S.C. Section 1983. Accordingly, defendants' Motion to Dismiss all 42 U.S.C. Section 1983 claims will be granted.

E. Plaintiff's 42 U.S.C. Section 1981 Claim

Plaintiff also claims that FSU's decision to not renew his contract violated 42 U.S.C. Section 1981. Plaintiff's contract was for employment with a state agency and all named parties are state employees. State actors are not subject to liability under 42 U.S.C. Section 1981 since 42 U.S.C. Section 1983 was intended to be the exclusive federal remedy for violation of rights guaranteed under 42 U.S.C. Section 1981. Jett. v. Dallas Independent School District, 491 U.S. 701 (1989). Thus, plaintiff's claims against all defendants for violation of 42 U.S.C. Section 1981 must be dismissed.

F. Plaintiff's Class Action Claim

Plaintiff claims that he is part of a "class" of employees created by defendants which has been discriminated against. Plaintiff contends that this "class" consists of employees who were

reviewed for contract renewal during a time when they were no longer employees of FSU. This claim is extremely vague; however, there are several possibilities to explain plaintiff's claim. Plaintiff might be attempting to file a class action claim

or he might be attempting to allege an equal protection violation.

If plaintiff is attempting to state a class action claim, he has not demonstrated sufficient facts for a class to be certified under Fed.R.Civ.P. 23. Thus, any claim for certification of a class action must be denied and all claims for the creation of a "class" must be dismissed.

The other possibility is that plaintiff was attempting to argue that he was denied equal protection when he was considered for contract renewal during a period of time when he was not actually an employee of FSU. However, plaintiff fails to allege that he was treated differently in any way from other employees of FSU who were considered for contract renewal while they were FSU employees. Simply because plaintiff was in a category unlike most employees considered for contract renewal is not enough to create a valid claim. Plaintiff has not argued that any employee in his supposed class was treated any differently than an employee outside this class. Thus, plaintiff has failed to state a claim for violation of

his equal protection rights. Accordingly, any claim for violation of equal protection must be dismissed.

G. Plaintiff's Request for Review under N.C.G.S. Section 150B-45

Plaintiff has requested judicial review of a final decision rendered by the Board of Governors of the University of North Carolina pursuant to N.C.G.S. Section 150B-45. However, N.C.G.S. Section 150B-45 only gives the power of judicial review to either the Superior Court of Wake County or the Superior Court of the county where plaintiff resides. There is no statutory authority for any other court to review a final decision under North Carolina's Administrative Procedure Act.

Since North Carolina has chosen to confer judicial review to specific courts, and plaintiff has not presented any evidence to indicate that he would not receive a fair hearing in the proper court, this court has no jurisdiction to review the decision made by the Board of Governors for the University of North Carolina. Plaintiff has an adequate avenue of review in

the state court system in accord with N.C.G.S. Section 150B-145 and it would be redundant and wasteful for this Court to disrupt the state court proceedings. Accordingly, this Court declines to review the plaintiff's administrative claims.

H. Amended Claim for Violation of Title VII

Plaintiff amended his complaint to allege a violation of 42 U.S.C. Section 2000e-5(c). Defendants argue that this claim is barred by the statute of limitations and should be dismissed.

Title VII requires that aggrieved persons file a complaint with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. Section 2000E-5(e).

Any charge filed after this 180-day period is time-barred. Hamilton v. First Source Bank, 928 F.2d 86 (4th Cir. 1990) (en banc). In the present action, plaintiff filed his EEOC charge against FSU on March 29, 1994. In his EEOC complaint, plaintiff alleged that on August 2, 1993, he was formally notified that he would not be granted an Associate

Professorship and that his services were no longer needed at FSU. Assuming this date to be accurate, plaintiff was required to file his EEOC charge no later than February 2, 1994. Plaintiff clearly failed to file his EEOC charge within the statutorily proscribed time.

Using the August 2, 1993 date to compute the date for the running of the 180-day period is putting a liberal interpretation on the facts. Plaintiff was initially informed that he was not to have his contract renewed on February 8, 1990. For the purposes of a Title VII action, the alleged discrimination occurs at the time the nonrenewal decision is communicated to the plaintiff. Delaware State College v. Ricks, 449 U.S. 250 (1980).

Plaintiff is also prohibited from arguing that the grievance proceedings tolled the running of the 180-day period. The Court in Delaware stated that a grievance procedure or other method of collateral review does not toll the running of the Title VII filing period since the grievance procedure is a remedy for a prior decision and not an

opportunity to influence that decision prior to its making. Delaware at 261. Thus, a reasonable interpretation of the facts indicates that plaintiff should have filed his EEOC charge within 180-days of February 8, 1990. Plaintiff clearly failed to file his EEOC charge within 180-days of the alleged unlawful employment action. Since plaintiff failed to file his EEOC charge within 180-days of either the February 8, 1990 action or the August 2, 1993 action, his Title VII claims are barred. Accordingly, defendants' Motion to Dismiss plaintiff's Title VII claim is granted.

IT IS, THEREFORE, ORDERED that defendants' Motion to Dismiss all claims be, and the same hereby is, **GRANTED** and that all claims be **DISMISSED.**

(SD.) Hiram H. Ward
United States District Judge

APPENDIX B

THE UNIVERSITY OF NORTH CAROLINA

General Administration

P.O. Box 2688

Chapel Hill 27515-2688

ELIZABETH BUNTING
Special Assistant to the President

TELEPHONE: (919)962-1000

Confidential

September 16, 1991

Dr. T. M. Viswanathan
Blues Farm Road 1332, Apt. 15
Laurinburg, NC 28352

Dear Dr. Viswanathan:

On Friday, September 13, 1991, the Board of Governors considered and decided your appeal from the decision of the Board of Trustees of Fayetteville State University. I have enclosed the report adopted by the Board. In summary, the Board found that the decision not to

reappoint you could have been based upon an impermissible reason under section 604 of the Code of the University.

Accordingly, the Board reversed the nonreappointment decision and remanded this case back to FSU. As directed by the Board, if you now wish to seek reappointment, you should make such a request to Chancellor Hackley. Such a review would thereafter be initiated at the departmental level.

This notice to you will complete the Board of Governors procedures and action with regard to this case. Please call me if you have questions about this letter or the Board's report.

Sincerely,

(Sd.) _____
Elizabeth C. Bunting

THE UNIVERSITY OF NORTH CAROLINA is composed of the sixteen public senior institutions in North Carolina

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APPENDIX B

REPORT OF THE COMMITTEE ON PERSONNEL AND TENURE IN THE MATTER OF THE APPEAL OF DR. T.M. VISWANATHAN FAYETTEVILLE STATE UNIVERSITY

ADOPTED BY THE BOARD ON September 13, 1991

Professor Viswanathan was appointed to a one-year tenure-track position as an Associate Professor in the Department of mathematics and Computer Science at Fayetteville State University for the 1989-90 academic year. By letter dated February 8, 1990, he was given timely notice that he would not be reappointed to a second one-year term. He then appealed this decision and was granted a hearing before the FSU Hearing and Reconsideration Committee. At hat hearing, he contended that the decision not to reappoint was based upon personal malice and also that the decision was an act of retaliation for the exercise of his First Amendment rights.

The Hearing and Reconsideration Committee held the requested hearing on May 8, 1990, and at its conclusion, recommended that the non-renewal decision be reversed; the Committee specifically recommended a "one-year renewal" of Professor Viswanathan's contract. Chancellor Hackley declined to accept this recommendation in a letter dated August 24, 1990, and an appeal was then lodged with the FSU Board of Trustees. After a hearing, that Board upheld the Chancellor's decision. Professor Viswanathan then appealed to the Board of Governors. The matter was referred to this Committee as required by Section 301D of the Code [of the University of North Carolina]. After some discussion, the parties agreed on the content of the record and submitted written arguments in support of their contentions. The matter was then referred to a subcommittee composed of Mr. Pat Taylor, Mr. Adams and Mr. Spaulding.

The subcommittee met on Thursday September 12, 1991, reviewed the record on appeal, considered the written statements of the parties and received their oral presentation.

Based upon that record and review, the Committee on Personnel and tenure has received and approved the following subcommittee findings and recommendations.

At the evidentiary hearing before the FSU Hearing and Reconsideration Committee, Professor Viswanathan submitted evidence which tends in summary to show the following chronology:

(1) In the early fall of 1989, Professor Viswanathan made statements at several meetings of the faculty which were quite critical of the academic administration at FSU.

(2) During December 1989, the tenured faculty of the Department of Mathematics and Computer Science recommended that Dr. Viswanathan be reappointed.

(3) On November 11, 1989, the Department Chair of Mathematics and Computer Science signed an evaluation which recommended Dr. Viswanathan for reappointment as an Associate Professor.

(4) This recommendation was approved by the Dean of the School of arts and Sciences and forwarded to the Office of Vice Chancellor Joseph Monroe.

(5) The FSU Committee on Tenure, Promotion, and Reappointment also recommended reappointment and sent these findings to Dr. Monroe.

(6) On December 4, 1989 at a faculty meeting with the Chancellor, Dr. Viswanathan publically criticized Dr. Monroe for failing to emphasize publication and research.

(7) On December 7, 1989, Dr. Viswanathan was called to a conference with the Dean, and the Department Chair, where he was told that he needed to "adapt" to the situation at FSU.

(8) On January, 1990, Dr. Monroe wrote a memorandum to Chancellor Hackley recommending that Professor Viswanathan not be reappointed. He indicated in this document that this was based on Professor Viswanathan's unhappiness with the teaching conditions at FSU. In a later letter, further explaining his reasons for the

non-reappointment recommendation, he stated that the professor had "serious problems of adjustment."

(9) Chancellor Hackley accepted this recommendation and so notified Professor Viswanathan in a letter dated February 8, 1990.

The evidence presented tends to show that the negative recommendation of the Vice Chancellor could have been based in part on Professor Viswanathan's critical remarks. Because the remarks appear to be protected speech, this possible motivation on the Vice Chancellor's part would violate the First Amendment to the U.S. Constitution. A decision tainted in this manner would be specifically proscribed under 604B of the Code [of the University of North Carolina].

An appropriate remedy in cases where a nonreappointment decision is based on an impermissible reason is to conduct a new review of the faculty member's credentials. Such a review should be removed from the prior taint, but should also allow the institution an opportunity to

consider the current credentials of the faculty member. To accomplish these ends, the Committee recommends that the nonreappointment decision be reversed and that Professor Viswanathan be given an opportunity to request reappointment as an Associate Professor. This request, if made, should follow the procedures proscribed [sic] by FSU Tenure Regulations and should be initiated at the department level.

(Sd.) _____
John A. Garwood, Chairman
September 13, 1991

APPENDIX B

THE UNIVERSITY OF NORTH CAROLINA

General Administration

ELIZABETH BUNTING
Special Assistant to the President

TELEPHONE: (919)962-1000

June 16, 1992

Dr. Tenkasi M. Viswanathan
Blues Farm Road 1332, Apt. 15
Laurinburg, NC 28352

Dear Dr. Viswanathan:

On Friday, June 12, 1992, the Board of Governors considered and decided your appeal. I enclose the report adopted by the Board.

This notice to you will complete the Board of Governors procedures and action with regard to this case.

Sincerely,

(Sd.)_____
Elizabeth C. Bunting

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APPENDIX B

REPORT OF THE COMMITTEE ON PERSONNEL AND TENURE IN THE MATTER OF THE APPEAL OF DR. T.M. VISWANATHAN FAYETTEVILLE STATE UNIVERSITY

ADOPTED ON June 12, 1992

This is the second appeal of Dr. Viswanathan concerning a non-reappointment decision for the 1990-91 academic year. In the first appeal, Dr. Viswanathan contended that the negative decision resulted from retaliation for his exercise of his right of free speech. After a thorough review of the record of this case, this Committee recommended and the Board adopted the following finding:

> The evidence presented tends to show that the negative recommendation of the Vice Chancellor could have been based in part on Professor Viswanathan's critical remarks. Because the remarks appear to be protected speech, this possible motivation on the Vice Chancellor's part would violate the First Amendment to the U.S. Constitution. A decision tainted in this manner would be specifically proscribed under 604B of the Code [of the University of North Carolina].

As a remedy the Board remanded the case to Fayetteville State University, ordered that Dr. Viswanathan be given an opportunity to request reappointment and specified the nature of this review:

> Such a review should be removed from the prior taint, but should also allow the institution an opportunity to consider the current credentials of the faculty member.

This decision was adopted on September 13, 1991, and shortly thereafter Dr. Viswanathan submitted his credentials to the institution. The new review took place during the 1991-92 academic year and recently culminated in a decision not to reappoint Dr. Viswanathan. This new appeal is grounded on the contention that the new review process did not comply with the Board's order of September 13, 1991. The matter was referred to a subcommittee composed of Mr. Spaulding, Mr. Adams and Dr. Danieley.

The subcommittee met on Wednesday, June 3, 1992, and reviewed the record on appeal and thoroughly considered the contentions raised by Dr. Viswanathan. The Committee on Personnel and Tenure has received and approved the following subcommittee findings and recommendation.

The Board's first decision in this case contemplated a fair and untainted reconsideration of Dr. Viswanathan's

request for reappointment. The evidence in the record supports the finding that this second review was consistent with the Board's order. The Committee therefore concludes and recommends that the decision not to reappoint Dr. Viswanathan be upheld.

(Sd.) _____
John A. Garwood, Chairman
6-12-92
Date

APPENDIX B

NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NO. 92 CVS 2024

FILED FEBRUARY 24, 1993

TENKASI M. VISWANATHAN	:
Petitioner	:
	:
vs.	:
	:
UNIVERSITY OF	:
NORTH CAROLINA AND	:
FAYETTEVILLE STATE	:
UNIVERSITY,	:

Respondents :

_____ :

ORDER ON PETITION FOR JUDICIAL REVIEW

THIS CAUSE coming to be heard and being heard before the undersigned Judge of Superior Court on the 8th of February, 1993, the Petitioner being present and represented by Steven J. O'Connor of Rose, Ray, Winfrey & O'Connor, P.A. and the Respondent being represented by Thomas J. Ziko, Special Deputy Attorney General, North Carolina Department of Justice; and the Court having heard the arguments of the parties and having reviewed the record as submitted in the case; the Court finds as follows:

1. This is not a contested case in which an administrative law judge made a recommended decision and therefore the court is not required to make any initial determinations under N.C. Gen. Stat. Section 150B-51(a).

---

2. The substantial rights of the Petitioner have been prejudiced because the agency's final decision was made upon unlawful procedure under N.C. Gen. Stat. Section 150B-51(b)(3) in that Petitioner was denied the process and procedure set out in Section 5 of the Fayetteville State University Tenure Policies and Regulations, specifically being a conference with Jon M. Young, Acting Dean of the College of Arts and Sciences, and a hearing before the Fayetteville State University Hearing and Reconsideration Committee to determine whether the decision of John M. Young, Acting Dean of the College of Arts and Sciences, not to reappoint Petitioner to a second one-year appointment was based on impermissible reasons of Petitioner's exercise of rights guaranteed by the First Amendment of the United States Constitution and personal malice. Exception No.2 set out in the Petition for Judicial Review is sustained.

3. The Fayetteville State University Tenure Policies and Regulations did not require that Petitioner be notified of

non-reappointment at least 90 days before the end of the 1991-92 academic year (the academic year during which the reappointment review ordered by the University of North Carolina Board of Governors, by order dated September 13, 1991, took place) and failure to give any such notice was not unlawful procedure under N.C. Gen/. Stat. Section 150B-51(b)(3). Exception No. 3 set out in the Petition for Judicial Review is overruled.

4. Petitioner did not brief or argue Exception No. 1 set out in the Petition for Judicial review and the court hereby overrules such Exception No. 1.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the agency's final decision in the above-captioned matter is reversed under N.C. Gen. Stat. Section 150B-51(b)(3) and it is ordered that the above-captioned case be remanded to Fayetteville State University, to give Petitioner an opportunity under Fayetteville State University's Tenure Policies and Regulations to have a conference with Jon M. Young, Acting Dean of the College

of Arts and Sciences, and the further opportunity to request a review of Jon M. Young's decision by the Fayetteville State University Hearing and Reconsideration Committee, and that further procedure thereafter follow the Fayetteville State University Tenure Policies and Regulations.

This the 19 th day of February, 1993.

(Sd.)
QUENTIN T. SUMNER
SUPERIOR COURT JUDGE PRESIDING

APPENDIX B

FSU FAYETTEVILLE STATE UNIVERSITY
1200 Murchison Road, Newbold Station
Fayetteville, NC 28301-4298
(919)486-1111

OFFICE OF THE
BOARD OF TRUSTEES

October 14, 1993

Dr. T.M. Viswanathan
2615-B Confederate Drive
Wilmington NC 28403

Dear Dr. Viswanathan:

On Tuesday, October 5, 1993, the Board of Trustees of Fayetteville State University considered and decided your appeal. The Board carefully reviewed the entire transcripts, documents, report of the University's Hearing and Reconsideration Committee, the Chancellor's letter of August 2, 1993, as well as your documents of appeal. The Board did not find that you provided any additional information that supported a reversal of the Chancellor's decision of non-reappointment to the faculty. The Board concluded to accept the Chancellor's decision and confirmed the Chancellor's authority to not reappoint you to a faculty position.

Should you desire to initiate review of this decision, you must submit a written notice of appeal to the Board of Governors within ten (10) days after receipt of this letter. The notice of appeal shall be addressed as follows:

Mr. Samuel H. Poole, Chairman
Board of Governors
c/o The University of North Carolina
910 Raleigh Road
P.O. Box 2688
Chapel Hill, NC 27515-2688

Sincerely,

(Sd.) Hector Mceachern, Chair
Board of Trustees
Fayetteville State University

cc Dr. Lloyd V. Hackley, Chancellor
FSU Board of Trustees

Fayetteville State University is a constituent institution of The University of North Carolina

APPENDIX B

SEAL of the University

THE UNIVERSITY OF NORTH CAROLINA

General Administration
POST OFFICE BOX 2688
CHAPEL HILL, NC 27515-2688

Appalachian State University
East Carolina University
Elizabeth City State University
Fayetteville State University
North Carolina Agricultural and
Technical State University
North Carolina Central University
North Carolina School of the Arts
North Carolina State University at
Raleigh
Pembroke State University
University of North Carolina at Asheville
University of North Carolina at
Chapel Hill

University of North Carolina at Charlotte
University of North Carolina at
Greensboro
University of North Carolina at
Wilmington
Western Carolina University
Winston-Salem State University

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ROSALIND FUSE-HALL
Secretary of the University
Telephone (919)962-4615
FAX: (919) 962-2751

September 9, 1994

Dr. T. M. Viswanathan
Post Office Box 295
Newell, North Carolina 28126

Dear Dr. Viswanathan:

The Chairman of the Board of Governors has asked me to convey to you the enclosed copy of the report received and approved by the Board at its meeting held on September 9, 1994. This constitutes final University disposition of the question you advanced to the Board.

Sincerely,
(Sd.)_____

Rosalind Fuse-Hall

Enclosure
cc: Chancellor L.V. Hackley

APPENDIX B

REPORT OF THE COMMITTEE ON UNIVERSITY GOVERNANCE IN THE APPEAL OF T.M. VISWANATHAN

We bring to you today the appeal of a faculty member at Fayetteville State University. This case began in February 1990, when Dr. T.M. Viswanathan sought review of a decision not to renew his tenure track contract as an Associate Professor in the Department of Mathematics and Computer Science. The FSU faculty Hearing and Reconsideration Committee disagreed with the nonrenewal decision. Chancellor Hackley, however, determined that the evidence did not support a finding of impermissible reasons

and that the nonrenewal decision should stand. His decision was sustained by the FSU Board of Trustees.

On appeal to the Board of Governors, the Chancellor's decision was reversed and the case was remanded to FSU. Because there was some evidence that Dr. Viswanathan could have been penalized for a speech he had made on campus, the matter was remanded to FSU. When this decision was made on September 16, 1991, the faculty roster had been set for the 1991-1992 academic year. Thus, as a remedy, the Board of Governors directed that Professor Viswanathan be given an opportunity to apply for a new position in the Department of Mathematics and Computer Science for the 1992-93 academic year.

Thereafter Dr. Viswanathan did submit an application for employment and this was referred to the department chair. Although the math faculty recommended that a position be offered, the chair determined that Dr. Viswanthan's credentials did not match the department's instructional needs. This recommendation not to offer an appointment

was forwarded to the Dean and the Vice Chancellor who both agreed with the chair's decision. Based upon these reviews, the Chancellor notified Dr. Viswanathan that a position would not be offered to him.

In a letter to President Spangler, Dr. Viswanathan questioned this outcome and asked whether the institutional decision complied with the Board's September 1991 order. The matter was then referred back to the Board which found in a decision dated June 12, 1992 that the review at FSU was consistent with the Board's earlier decision.

Professor Viswanathan then sought to appeal the decision not to offer him an appointment through the campus procedures for non-reappointment cases. When these avenues were not made available to him, he filed suit in New Hanover County Superior Court, contending that he had a right to a campus review. The court agreed that he had a right to review in accord with the FSU procedure and ordered that this process should begin. The institutional steps of

conference and a review before the Hearing and Reconsideration Committee began in March 1993.

In the administrative chain, the Dean and the Vice Chancellor met with Dr. Viswanathan and considered his contentions. Each of these officials, however, recommended that he not be appointed. Thereafter, Dr. Viswanathan sought review from the faculty Hearing and Reconsideration Committee. Although this committee found that there was evidence of impermissible reasons, the Chancellor did not accept this recommendation; he determined that the associate professor position would not be offered to Dr. Viswanathan. This decision was then sustained by the FSU Board of Trustees.

After an appeal was filed with the Board of Governors, the case was referred to the Committee on University Governance for its review and recommendation. A hearing was conducted on July 8, 1994, at which time presentations were made by Dr. Viswanathan and his attorney, and by Ms. Lessane on behalf of the Chancellor.

After a thorough review of the Record, the written contentions of the parties and oral presentations made during this appeal, the Committee has made the following findings: First, we recognized that because the remedy directed by the Board after the first appeal was an opportunity to make application for a position, this case might be considered a review of refusal to hire. The Board has held in several recent cases that there is no appellate jurisdiction for such a review, and on this precedent, we found that the decision of the FSU Board of Trustees should be sustained. Second, we also recognized that this case initially was considered as an appeal from a decision not to reappoint a faculty member to a tenure track position. Because of this posture, we have also undertaken a review as to whether Dr. Viswanathan carried his burden of proving that the institutional decision was based upon an impermissible reason. Considering all of the written submissions and oral presentations, we found that the burden of proof was not carried by Dr. Viswanathan in this case.

Thus, for all of the foregoing reasons, we recommend to you that the decision of the FSU Board of Trustees be sustained. Dr. Viswanathan has not shown he was improperly denied a position in the Department of Mathematics and computer Sciences at Fayetteville State University.

(Sd.) Mrs. Maxine H. O'Kelley, Chairman
Committee on University Governance

Sept. 9, 1994
(date)

Received and approved by
The Board of Governors
September 9, 1994

(Sd.) Rosalind Fuse-Hall, Secretary
The University of North Carolina

Sept. 9, 1994
(date)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

Case No. 1:94CV528

Docket Entry: 55
Filed April 23, 1996

TENKASI. M. VISWANATHAN,)
)
Plaintiff,)
)
v.)
)
THE UNIVERSITY OF NORTH)
CAROLINA BOARD OF)
GOVERNORS et al.,)
)
Defendants.)
)

ORDER

WARD, Senior Judge

On March 1, 1996, this court granted Defendants' Motion to Dismiss and entered a judgment dismissing this action ("Dismissal Order"). Plaintiff filed a Combined Motion Under Rules 52(b) and 59(e) in which he moved for additional findings and amendment or alteration of the Dismissal Order on March 18, 1996. On April 1, 1996, Plaintiff gave Notice of Appeal of the Dismissal Order.

"The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). The filing of a timely post-trial motion will toll the time for filing a notice of appeal and make any subsequent notice of appeal ineffectual. See id. at 60-61. Motions under Fed.R.Civ.P.52(b) and 59(e) must be filed within ten days of the date of judgment. Under the Fed.R.Civ.P. 6(a)'s provision for computation of time, the ten-day period for filing such motions in response to the Dismissal Order ran out on March 15, 1996. In his Combined Motion, Plaintiff asserts that he "is serving this motion in a timely manner on the 15th day of March, 1996, the tenth day after entry of the order." Even if this unsworn representation is accepted as true, the text of the Rules and their respective advisory Committee Notes make clear that such motions must be "filed", not "served," by the deadline; thus, Plaintiff's

Combined Motion is untimely and his Notice of Appeal was effectual. Because the Dismissal Order is the subject of both Plaintiff's Combined Motion and appeal, this Court has no jurisdiction to rule on the Combined Motion. Further, if the Combined Motion were treated as timely and jurisdiction was proper, it is determined that the Combined Motion should be denied because it presents no basis for altering or amending the Dismissal Order. For these reasons,

IT IS ORDERED that this Court lacks jurisdiction to rule on Plaintiff's Combined Motion Under Rules 52(b) and 59(e).

This the 24th day of April, 1996.

(Sd.) Hiram Ward
UNITED STATES DISTRICT JUDGE

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 1. FREEDOM AND RESPONSIBILITY IN THE UNIVERSITY COMMUNITY

Fayetteville State University is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. This institution, therefore, supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, research, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.

Fayetteville State University shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.

Faculty and students of this institution shall share in the responsibility for maintaining an environment in which academic freedom flourishes and in which the rights of each member of the academic community are respected.

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 2. ACADEMIC FREEDOM AND RESPONSIBILITY OF FACULTY

It is the policy of Fayetteville State University to support and encourage full freedom, within the law, of inquiry, discourse, teaching, research, and publication for all members of the academic staffs of this institution. Members of the faculty are expected to recognize that accuracy, forthrightness, and dignity befit their association with this institution and their position as men and women of learning. They should not represent themselves, without authorization, as spokesmen for Fayetteville State University.

Fayetteville State University will not penalize or discipline members of the faculty because of the exercise of academic freedom in the lawful pursuit of their respective area of scholarly and professional interest and responsibility.

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 3. ACADEMIC TENURE

Subsection A. GENERAL

Academic tenure refers to the conditions and guarantees that apply to a faculty member's employment. More specifically, it refers to the protection of a faculty member against involuntary suspension or discharge from employment or reduction in rank by Fayetteville State University except upon specified grounds and in accordance with the procedures provided in Section 4 and against termination of employment except as provided for in Section 6.

Academic tenure for faculty members is intended to secure their academic freedom and to help the institution attract and retain faculty members of high quality. While academic tenure may be withheld on any grounds except those specifically stated to be impermissible under Section 5.A., a recommendation of permanent tenure requires that the

faculty member's demonstrated professional competencies, his potential for future contributions, and institutional needs and resources be assessed.

Subsection B.

IN RELATION TO FACULTY RANKS

Academic tenure, as herein described, pertains exclusively to the employment of faculty members by appointment to specific faculty ranks. Such appointments may be for fixed terms of employment, automatically terminable when they expire (fixed term appointment); or they may be for probationary terms (probationary term appointment); or they may be continuous until retirement, death, or resignation (appointment with permanent tenure).

The faculty ranks to which appointments may be made and the incidents of academic tenure applicable to each are:

(1) **Instructor.** . . .

(2) **Assistant Professor.** . . .

(3)

Associate Professor. When a faculty member's initial appointment by the institution is to the rank of associate professor, the appointment shall be to a probationary term of one year. Unless at any point the associate professor is not reap-pointed, he shall be reappointed to a second one-year term and then to a three-year term before a decision is made whether to recommend permanent tenure at the same or higher rank or to offer a terminal appointment of one academic year. At least 90 days before the end of his first one-year appointment, the associate professor shall be given written notice whether, when his current term expires, he will be reappointed at the rank of associate professor for another one-year term or not reappointed. At least 180 days before the end of his second consecutive one-year appointment, he shall be given written notice whether, when his current term expires, he will be reappointed at the

rank of associate professor for a three-year term or not reappointed.

Before the end of the second year of his three-year term, he shall be given written notice whether he will be recommended for permanent tenure at the same or higher rank when his current term expires or not reappointed.

Failure to give the required notice of a decision not to reappoint at any point herein required has the same effect as a decision at that time to offer a terminal appointment at the same rank for one academic year. The decision herein required shall be made as provided in Section 3.C.

A promotion at any time from the rank of associate professor to that of professor confers permanent tenure from the effective date of the promotion. Since this promotion confers tenure, it must be finally approved by the president and the

Board of Governors of the University of North Carolina.

(4) **Professor.**

(5) **Special Faculty Appointments.**

Subsection C.

GENERAL PROVISIONS

(1)

Initiation, Review, and Approval of Appointments, Pro-motions, and Reappointments. Each initial appointment with a fixed or probationary term, **each** promotion in rank, each reappointment to a fixed term, and each reappointment of an instructor, assistant professor, associate professor, or professor, whether or not the reappointment recommends the conferral of permanent tenure shall be initiated by recommendation of the chairman of the department[1]

---

[1] "Department" is used herein as a generic term for departments and any other academic units to which faculty appointments are made. "Chairman" as a generic term for department chairman and any other heads of academic units to which faculty appointments are made.

concerned. In making a recommendation, the chairman shall consult with the department's assembled tenured faculty members. If the department has too few tenured faculty members to give a representative view of departmental opinion, the chairman shall consult with the senior members of the department who are familiar with the work of the candidate being considered.

The chairman's recommendation shall be sent to the division chairman, who shall forward it with his recommendation to the provost/ vice chancellor for academic affairs. The provost/vice chancellor will attach his recommendation and then forward all recommend-recommendations to the chancellor. The chancellor, in arriving at this decision, shall consult with the Committee on Tenure, Promotion, Appointments, and Reappointment.[2]

---

[2] See the current constitution of the Fayetteville State University Senate for the composition of this committee.

If the chancellor decides not to recommend reappointment, promotion, or permanent tenure, he shall give the faculty member being considered a simple, unelaborated, written statement of the decision. This decision is final except as it may later be reviewed in accordance with the provisions of Section 5. If the chancellor concurs in a recommendation that will confer permanent tenure, he shall consult with the Board of Trustees and, unless dissuaded, forward, the recommendation to the president and Board of Governors for approval. All other favorable recommendations by the chancellor in regard to appointments, reappointments, and promotions shall be forwarded by him to the Board of Trustees for final approval unless the board delegates the authority to give final approval.

(2)

Decision Not to Reappoint Upon Expiration of Probationary Terms. The decision not to

reappoint when a probationary term appointment as instructor, assistant professor, associate professor, or professor expires shall be made by the chairman of the department concerned after consulting with the depart-ment's assembled tenured faculty. If the department has too few tenured faculty members to give a representative view of departmental opinion, the chairman shall consult with senior members of the department who are familiar with the work of the candidate for reappointment. The chairman's decision is final except as it may be later reviewed in accordance with the provisions of Section 5. The chairman shall notify the faculty member of his decision by a simple, unelaborated statement that the faculty member will not be reappointed. Each decision not to reappoint shall be communicated for information through the administrative channels pre-scribed for review had the decision been to reappoint.

(3) Early Promotion and Tenure.

(4) Visiting Faculty Members.

(5)

Terms and Conditions of Appointments.

The terms and conditions of each appointment and each reappointment to the faculty shall be set out in writing. A copy of the terms, signed by the chancellor, shall be delivered to the faculty member, and the chancellor shall retain a copy. The general terms and conditions of such appointments, including those provided herein, shall be either set out in the document of appointment or incorporated therein by clear reference to specified documents that shall be readily available to the faculty member.

Any special terms and conditions shall be clearly stated in the written appointment. Except as herein provided, no special terms or conditions may be included that vary with the general terms and conditions stated herein. The responsibility for initiating the inclusion of special terms and conditions

in documents of appointments shall be with the chairman who recommends the appointment.

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 5.

NONREAPPOINTMENT OF FACULTY MEMBERS ON PROBATIONARY APPOINTMENTS

Subsection A.

PERMISSIBLE AND IMPERMISSIBLE GROUNDS FOR NONREAPPOINTMENT

The decision whether to reappoint a faculty member when a probationary term appointment expires may be based on any factor considered relevant to the total institutional interests, but it must consider the faculty member's demonstrated professional competence, his potential for future contributions, and institutional needs and resources. These considerations may form, in whole or in part, the basis of the ultimate decision, except that a decision not to

reappoint may not be based upon (1) the faculty member's exercise of rights guaranteed by either the First Amendment to the United States Constitution or Article I of the North Carolina Constitution; (2) discrimination based upon the faculty member's race, sex, religion, or national origin; or (3) personal malice.

Subsection B.

CONFERENCE WITH DEPARTMENT CHAIRMAN

Within five days after receiving a written notice of nonreappointment, a faculty member may in writing request a private conference with his department chairman[6] to discuss the reasons for nonreappointment. This request shall be granted and the conference held forthwith, within five days after receipt of the request if possible.

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[6] If the initial decision not to reappoint is made by an administrative officer other than the chancellor, substitute the name of that administrative officer for department chairman whereever the latter phrase appears. If the initial decision not to reappoint is made by the chancellor or Board of Trustees, the faculty member who is not to be reappointed may seek review of that decision in accordance with the procedure set out in Section 501©(4) of The Code.

Within five days after the conference, the department chairman shall give the faculty member a simple, unelaborated, written statement of whether the original decision remains in effect.

Subsection C.

CONFERENCE WITH SUPERVISOR OF DEPARTMENT CHAIRMAN

Within five days after receiving notice that the original decision remains in effect, the faculty member may in writing request a conference with the department chairman's immediate administrative supervisor. This request shall be granted and the conference held forthwith, within five days after receipt of the request if possible.

Within ten days after this conference, the reviewing administrative officer shall send a written evaluation of the matter to the faculty member and to the department chairman. The evaluation may be in the form of an unelaborated concurrence with the decision; an expression of disagreement with the decision, with or without supporting reasons; or a recommendation for reconsidering the decision,

with or without suggestions for specific procedures for the reconsideration. Whatever form the evaluation may take, it is merely recommendatory and is not binding upon the department chairman or final as to the faculty member.

Within five days after receipt of an evaluation that disagrees with the decision or recommends its reconsideration, the department chairman shall give the faculty member and his immediate supervisor his response in writing.

Subsection D.

REQUEST FOR AND SCOPE OF REVIEW BY HEARING AND RECONSIDERATION COMMITTEE

Within five days after he receives notice of an unfavorable action resulting from the conference with the department chairman's supervisor, the faculty member may request that the Hearing and Reconsideration Committee review the decision. This review is limited solely to determining whether the decision not to reappoint was based upon any of the grounds stated to be impermissible in Subsection A of this section.

The request for review shall be written and addressed to the chairman of the committee. It shall specify the grounds upon which the faculty member contends that the decision was impermissibly based, with a short, plain statement of facts that the faculty member believes supports the contention.

Such a request constitutes on the faculty member's part: (1) a representation that he can prove his contention, and (2) an agreement that the institution may offer in rebuttal of his contention any relevant data within its possession.

The Hearing and Reconsideration Committee shall consider the request and grant a hearing if it determines that (a) the request contains a contention that the decision was impermissibly based under this section, and (b) the facts suggested, if established, will support the contention. A denial of the request finally confirms the decision. If the request is granted, a hearing shall be held within ten days after the request is received; the faculty member shall be given at least five days' notice of the hearing.

Subsection E.

CONDUCT OF HEARING

The hearing shall be conducted informally and in private. Only the members of the hearing committee, the faculty member, the department chairman, and such witnesses as may be called may attend, except that the faculty member and the department chairman may each be accompanied by a person of his choosing. A quorum for the hearing is a simple majority of the total committee membership. Committee members who hold an appointment in the faculty member's department, who will testify as witnesses, or who have any other conflict of interest are disqualified from participating in that hearing. If the faculty member requests it and the chairman of the committee approves, a transcript of the proceedings shall be made and provided to the faculty member. The committee may consider only such evidence as is presented at the hearing and need consider only the evidence offered that it considers fair and reliable. All witnesses may be questioned by the

committee members, the faculty member, the department chairman, and the representatives of the faculty members and chairman. Except as herein provided, the conduct of the hearing is under the committee chairman's control.

Subsection F.

HEARING PROCEDURE

The hearing shall begin with the faculty member's presentation of contentions, which shall be limited to those grounds specified in the request for a hearing and supported by such proof as he desires to offer. When the faculty member has concluded this presentation, the committee shall recess to consider whether he has established a prima facie case. If it determines that the contention has not been so established, it shall notify the parties to the hearing and thereupon terminate the proceedings. Such termination confirms the decision not to reappoint. If it determines that rebuttal or explanation is desirable, it shall notify the parties and the hearing shall proceed. The department chairman may then present rebuttal of the faculty member's contentions, or

in general support of the decision not to renew, such testimonial or documentary proofs as he desires to offer, including his own testimony.

At the end of this presentation, the Hearing and Reconsideration Committee shall consider the matter in executive session. The burden is upon the aggrieved faculty member to satisfy the committee that his contention is true.

Subsection G.

PROCEDURE AFTER HEARING

If the Hearing and Reconsideration Committee determines that the faculty member's contention has not been established, it shall, by a simple unelaborated statement, so notify him, the department chairman, and the department chairman's immediate supervisor. Such a determination confirms the decision not to reappoint. If the Hearing and Reconsideration Committee determines that the faculty member's contention has been satisfactorily established, it shall so notify him, the department chairman, and the department chairman's immediate supervisor by a written

notice that shall also include a recommendation for corrective action by the department chairman.

Within five days after receiving such a recommendation, the department chairman shall notify the faculty member, his own immediate supervisor, and the chairman of the Hearing and Reconsideration Committee what modifications, if any, he will make with respect to the original decision not to reappoint.

If the department chairman fails to make a recommended modification in the original decision, the Hearing and Reconsideration Committee shall submit a report to the Chancellor containing the committee's findings and recommendation and what it considers to be appropriate action by the chancellor to resolve the matter.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

SECTION 501 C.

Relation of the President to the University

Subsection (4) Subject to such regulations and limitations as may be prescribed by the Board of Governors, the faculties, staffs and student bodies of the constituent institutions, or any member thereof, may have the right to appeal the disposition of grievances to the Chancellor, and from the Chancellor to the President, and from the President to the Board of Governors; provided, that appeals based on policies, rules or regulations adopted by the Board of Trustees shall be addressed initially to the Chancellor, and from the Chancellor to the Board of Trustees, and, where allowed, from the Board of Trustees to the Board of Governors; however, all appeals addressed to or request for hearings by the Board of Governors, from whatever source, shall be transmitted through the President.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

SECTION 502

CHANCELLORS OF CONSTITUENT INSTITUTIONS

Subsection 502 C.(4)

The Chancellor shall be the official medium of communication between the Board of Trustees and all individuals, officials, agencies and organizations, both within and without the institution.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 600

FREEDOM AND RESPONSIBILITY IN THE UNIVERSITY COMMUNITY

(1) The University of North Carolina is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. The University, therefore, supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, research, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.

(2) The University and each constituent institution shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.

Faculty and students of The University of North Carolina shall share in the responsibility for maintaining an environment in which academic freedom flourishes and in

which the rights of each member of the academic community are respected.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 601

ACADEMIC FREEDOM AND RESPONSIBILITY OF FACULTY

(1) It is the policy of The University of North Carolina to support and encourage full freedom, within the law, of inquiry, discourse, teaching, research, and publication for all members of the academic staffs of the constituent institutions. Members of the faculty are expected to recognize that accuracy, forthrightness, and dignity befit

their association with this institution and their position as men and women of learning. They should not represent themselves, without authorization, as spokesmen for The University of North Carolina or any of its constituent institutions.

(2) The University and its constituent institutions shall not penalize or discipline members of the faculty because of the exercise of academic freedom in the lawful pursuit of their respective area of scholarly and professional interest and responsibility.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 602

ACADEMIC TENURE

(1) To promote and protect the academic freedom of its faculty, the Board of Trustees of each constituent institution shall adopt policies and regulations governing academic tenure.

(2) ...

(3) The tenure policies and regulations of each constituent institution shall prescribe the procedures by which decisions concerning appointment, reappointment, promotion and the conferral of permanent tenure shall be made. The lengths of terms of appointment that do not carry permanent tenure and those faculty ranks or titles whose holders shall be eligible for permanent tenure shall be prescribed. The institutional policies and regulations also shall prescribe the intervals at which the review of candidates for reappointment and promotion, including the conferral of permanent tenure, shall occur.

The tenure policies and regulations of each institution, which shall include the complete text of Chapter

Six of the Code, shall be published by the institution and distributed to its faculty members.

(4) ...

(5) ...

(6) Institutional tenure policies and regulations shall distinguish among the following:

(a) the nonreappointment (or nonrenewal) of a faculty member at the expiration of a specific term of service;

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 604

APPOINTMENT, NONREAPPOINTMENT AND REQUIREMENTS OF NOTICE AND REVIEW

SECTION 604 A.
Notice of Reappointment or Nonreappointment

(1) The decision not to reappoint a faculty member at the expiration of a fixed term of service shall be made by the appropriate institutional faculty and administrative officers early enough to permit timely notice to be given. For full-time faculty at the rank of instructor, assistant professor, associate professor or professor, the minimum requirement for timely notice shall be as follows:

(a) during the first year of service at the institution. The faculty member shall be given not less than 90 calendar days' notice before his employment contract expires;

(b) during the second year of continuous service at the institution, the faculty member shall be given not less than 180 calendar days' notice before his employment contract expires;

(c) after two or more years of continuous service at th institution, the faculty member shall be given

not less than twelve months' notice before his employment contract expires.

(2) Notice of reappointment or nonreappointment shall be written. If the decision is not to reappoint, then failure o give timely notice of nonreappointment will oblige the Chancellor thereafter to offer a terminal appointment of one academic year.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

SECTION 604 B.

Impermissible Reasons for Nonreappointment

In no event shall a decision not to reappoint a faculty member be based upon (a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North

Carolina Constitution, or (b) discrimination based upon the faculty member's race, sex, religion, or national origin; or (c) personal malice.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

APPENDIX [TO THE CODE]

DELEGATIONS OF DUTY AND AUTHORITY TO BOARDS OF TRUSTEES

[As adopted by the Board of Governors, 7/7/72, and amended through 8/1/88]

Pursuant to authority vested in it by the General Statutes, and consistent with the provisions of the Code of The University of North Carolina, the Board of Governors hereby delegates to the Boards of Trustees of the constituent institutions of The University of North Carolina the following duties and powers:

I. ACADEMIC AND ADMINISTRATIVE PERSONNEL

A. Appointment and Compensation

1. With respect to all faculty positions with permanent tenure and all senior administrative positions, namely vice chancellors, provosts, deans, and directors of major educational and public service activities, the Chancellor, following consultation with the Board of trustees, shall forward to the President recommendations with respect to such appointments, promotions and compensation; if the president concurs in such recommendations, he shall forward them to the Board of governors for approval.

2. With respect to all faculty and administrative positions, other than those identified in subparagraph 1 above, and other than those subject to the State Personnel act, the Chancellor shall forward his recommendations for appointment, promotion and compensation to the Board of Trustees; subject to applicable provisions of the University Code and to such policies as may be established by the Board of Governors, the action of

the Board of Trustees with respect to such personnel action shall be final.

APPENDIX F

CIVIL RIGHT STATUTES

42 U.S.C. SECTION 1981

EQUAL RIGHTS UNDER THE LAW

(a) **Statement of equal rights**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) **"Make and enforce contracts" defined**

For purposes of this section, the term "make and enforce contracts" includes the making, performance,

modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

© **Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(As amended Pub. L.102-166, title I. Section 101, November 21, 1991, 105 Stat.1071.)

Amendments 1991 – Pub. L.102-166 designated existing provisions as subsec. (a) and added subsecs. (b) and ©.

APPENDIX F

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

42 U.S.C. SECTION 1985

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

Subsection (3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering

the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Supreme Court, U.S.
FILED
FEB 4 1997
CLERK

No. 96-900

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

T. M. VISWANATHAN,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Thomas J. Ziko*
Special Deputy Attorney General

Celia Grasty Jones
Associate Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7387

*Counsel of Record

QUESTIONS PRESENTED

1. Are the lower courts' rulings consistent with this Court's precedent concerning the threshold showing necessary to state a legally sufficient claim for retaliatory discharge under 42 U.S.C. § 1983?

2. Are the lower courts' rulings consistent with this Court's precedent concerning the nature of property and liberty interests accorded Fourteenth Amendment due process protections under 42 U.S.C. § 1983?

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No. 96-900

IN THE
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T. M. VISWANATHAN,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Respondents Board of Governors of The University of North Carolina (UNC) *et al.*, the Honorable Michael F. Easley, Attorney General of North Carolina, and Thomas J. Ziko, Special Deputy Attorney General, request this Court to deny the PETITION FOR WRIT OF CERTIORARI filed by petitioner T. M. Viswanathan, which was placed on the docket on December 5, 1996. Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit, entered on

September 3, 1996, which affirmed *per curiam* the March 1, 1996 decision of the United States District Court for the Middle District of North Carolina granting Respondents' motion to dismiss Petitioner's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This brief in opposition to the Petition is timely, for pursuant to Rule 30.4 Respondents sought from the Clerk, and received by letter of January 3, 1997, an extension of the time allowed to respond, to and including February 4, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *T.M. Viswanathan v. Board of Governors of The University of North Carolina et al.*, 95 F.3d 43 (1996), is unpublished. A copy of the slip opinion is found in Petitioner's Appendix (Pet. App.) at pp. 1-3.

The memorandum opinion of the United States District Court for the Middle District of North Carolina, Durham Division, *Tenkasi M. Viswanathan v. The University of North Carolina Board of Governors et al.*, 1:94CV528, is unpublished. A copy of the memorandum opinion and order appears in Pet. App. at pp. 5-26.

JURISDICTION

Petitioner seeks jurisdiction of this Court to review the Court of Appeals' decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment I; United States Constitution Amendment XIV; 42 U.S.C. § 1983

STATEMENT OF THE CASE

The essential facts of this matter are adequately summarized in the District Court's memorandum opinion (Pet. App. pp. 7-12).

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. THE LOWER COURTS' RULINGS ARE CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING THE THRESHOLD SHOWING NECESSARY TO STATE A LEGALLY SUFFICIENT CLAIM FOR RETALIATORY DISCHARGE UNDER 42 U.S.C. § 1983.

The District Court correctly held, and the Fourth Circuit Court of Appeals correctly affirmed, that Petitioner failed to satisfy the threshold showing this Court has held is necessary to state a valid claim for alleged retaliatory discharge in violation of the First Amendment: that the content, form and context of Petitioner's statements showed that he spoke on "matters of legitimate public concern." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Holland v. Rimmer*, 25 F.3d 1251, 1255 (4th Cir. 1994). Applying *Connick v. Myers*, the District Court found that the speech Petitioner claimed resulted in the non-renewal of his one-year teaching contract did not, as

non-renewal of his one-year teaching contract did not, as a matter of law, rise to the level of genuine public concern accorded First Amendment protection under 42 U.S.C. § 1983. (Pet. App. p. 18) Accordingly, the dismissal of Petitioner's retaliatory discharge claim was fully in accord with this Court's relevant precedent.

Petitioner claimed that Fayetteville State University (FSU) did not renew his teaching contract because "[i]n the early fall of 1989, [he] made statements at several meetings of the faculty which were quite critical of the academic administration at FSU," and "[o]n December 4, 1989, at a faculty meeting with the Chancellor, [h]e publically [*sic*] criticized Dr. Monroe [then FSU Vice Chancellor for Academic Affairs] for failing to emphasize publication and research." (Petition p. 13) As the District Court observed, this Court long ago established that comments of the type Petitioner made, which are complaints of personal grievances arising from employment, are not matters of genuine concern to the public community such as are entitled to constitutional protection. (Pet. App. p. 19, citing *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)). *See also Arvinger v. Mayor & City Council of Baltimore,* 862 F.2d 75, 79 (4th Cir. 1988), *appeal after remand,* 894 F.2d 401 (4th Cir. 1990); *Joyner v. Lancaster,* 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987). (contrasting protected "public-spirited" speech with speech in the interests of the speaker). Petitioner's rhetoric extolling the sanctity of academic freedom notwithstanding, he failed to carry his essential burden under 42 U.S.C. § 1983 to allege and show that his critical remarks transcended the bounds

and concerns of his employment setting and his personal relationship to it. *See, e.g., Stroman v. Colleton County School District,* 981 F.2d 152, 156 (4th Cir. 1992); *Williams v. Alabama State University,* 102 F.3d 1179, 1183 (11th Cir. 1997). Whether Petitioner made this showing was a matter of law for the District Court to decide. *Connick v. Myers*, 461 U.S. at 147-48 n.7.

The decisions of this Court that Petitioner claims are contrary to the District Court's holding are completely inapposite to the legal claim Petitioner himself set forth in his complaint. (Petition pp. 21-25, citing *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967); *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957); *Meyer v. State of Nebraska*, 262 U.S. 390 (1922) (Frankfurter, J., concurring)). Each of these decisions dealt with the issue of the bounds of permissible governmental regulation in areas impinging on First Amendment freedoms, an issue that was not before the District Court.

Petitioner contends that the findings of two administrative bodies, the FSU Faculty Hearing and Reconsideration Committee and the UNC Board of Governors, "raise a presumption" that Petitioner's critical remarks satisfy the requirements of a cognizable First Amendment claim. (Pet. App. pp. 26-27) This contention is patently meritless. These state administrative bodies were neither guided nor constrained in their determinations by the standards applicable to a legal claim under 42 U.S.C. § 1983. In adjudicating Respondents' Rule 12(b)(6) motion, the District Court

considered as true all of the facts Petitioner pled (Pet. App. p. 7), including the facts Petitioner alleged in his complaint concerning these bodies' findings. To the extent those facts provided support relevant to the threshold showing Petitioner was required to make to survive the Rule 12(b)(6) motion, they are appropriately reflected in the District Court's opinion.

As the Court of Appeals affirmed, the District Court correctly applied the legal standards this Court has established for determining the viability of retaliatory discharge claims under 42 U.S.C. § 1983. Therefore, Respondents submit that this Court, in its discretion, should decline Petitioner's request for review.

II. THE LOWER COURTS' RULINGS ARE CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING THE NATURE OF PROPERTY AND LIBERTY INTERESTS ACCORDED FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS UNDER 42 U.S.C. § 1983.

Under the governing principles of Section 1983 jurisprudence that this Court has established, the viability of Petitioner's claim that FSU deprived him of constitutionally mandated due process in declining to renew his contract depends on the deprivation of a constitutionally protected property or liberty right in his employment at FSU. *E.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). These principles, set forth principally in *Board of Regents v. Roth*, determined the District Court's holding that Petitioner's non-renewal did

not deprive him of either a protected property right or a protected liberty right. (Pet. App. pp. 15-18) The District Court could not have held otherwise, consistent with this Court's relevant precedent.

A. No Protected Property Right In Continued Employment Was Implicated In Petitioner's Non-Renewal.

Petitioner's employment situation at FSU was precisely the situation of the assistant professor David Roth in *Board of Regents v. Roth*, *supra*. Like Roth, Petitioner was non-tenured and served on a one-year term contract (Pet. App. p. 16) that his university employer chose not to renew. Petitioner's contract, like Roth's, contained no guarantees of renewal. Thus, like Roth, Petitioner had no constitutionally protected property interest in re-employment, for Petitioner's interest in employment at FSU was created and defined by the terms of a contract that supported "absolutely no possible claim of entitlement to re-employment." *Board of Regents v. Roth*, 408 U.S. at 577-78. *See also Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) (it is well-established that faculty members with terminal contracts have no property rights to continued employment that are entitled to due process protection). *Accord Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 302-03, 337 S.E.2d 644, 648-49 (1985), *cert. granted*, 315 N.C. 589, 341 S.E.2d 28 (1986).

Petitioner had an advantage Roth did not, for FSU's Tenure Regulations afforded him access to a three-level post-termination appeal process. It is certain

alleged delays in the conduct of that process that Petitioner contends constituted violations of his due process rights under the Fourteenth Amendment. (Petition pp. 28-30) Certainly, *where an entitlement to Fourteenth Amendment procedural due process exists*, at some point a delay in conducting a post-termination hearing would become a constitutional violation. *Cleveland v. Loudermill*, 470 U.S. 532, 547 (1985) (discussing claim of discharged employee who had property right in continuation of employment by virtue of state law which provided he could be terminated only for just cause). When the employee has no property right in continued employment, however, he has neither a constitutional entitlement to any sort of hearing nor a legal claim for deprivation of Fourteenth Amendment due process arising from an alleged violation of the procedures established by state law or regulation for the conduct of any hearing he may be afforded. *Board of Regents v. Roth*, 408 U.S. at 578; *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *Clark v. Link*, 855 F.2d 156, 163 (4th Cir. 1988); *Riccio v. County of Fairfax*, 907 F.2d 1459, 1466 (4th Cir. 1990). Therefore, as the District Court and the Court of Appeals affirmed, as a matter of well-established law Petitioner has no basis for his claim that the non-renewal of his contract deprived him of Fourteenth Amendment due process rights.

B. No Protected Liberty Interest Was Implicated In Petitioner's Non-Renewal.

On the basis of the principles articulated in *Board of Regents v. Roth*, the District Court properly held that FSU's decision not to reappoint Petitioner to a second

one-year contract did not implicate any liberty interest protected by the Fourteenth Amendment. (Pet. App. pp. 16-17) In this respect, as well as in their employment status, Petitioner and David Roth were similarly situated. Like Roth, Petitioner did not claim that his non-renewal so stigmatized him that his freedom to take advantage of other employment opportunities was foreclosed. (Pet. App pp. 16-17) *Board of Regents v. Roth*, 408 U.S. at 573-74. In fact, the complaint disclosed that Petitioner has obtained other employment since the termination of his employment with FSU. (Pet. App. p. 17)

Although Petitioner claimed that his professional reputation was "put in jeopardy" when he was not rehired (Pet. App. p. 17), as with Roth there was no claim that FSU based the non-renewal of Petitioner's contract on charges that might seriously damage his standing and associations in the community. (Pet. App. p. 17) *Board of Regents v. Roth*, 408 U.S. at 573. The law is clear that, without such charges, injury to one's reputation is not a constitutionally protected interest. *Paul v. Davis*, 424 U.S. 693, 701, *reh'g denied*, 425 U.S. 985 (1976). As the District Court observed, any damages Petitioner may have sustained flowing from injury to reputation are properly recoverable under the common law of libel and slander. *Siegert v. Gilley*, 500 U.S. 226, 234 (1991).

The District Court's holding is consistent not only with this Court's precedent but with the federal appeals court decisions Petitioner contends conflict with it. (Petition pp. 4-5, citing *Bone v. City of Lafayette*, 763 F.2d 295, 298 (7th Cir. 1985); *Lawson v. Sheriff of*

Tippecanoe County, 725 F.2d 1136, 1138 (7th Cir. 1984)). These decisions expound the principle that, even where a person has no property right in his continued employment, defamation by his employer in the course of terminating that employment may work to deprive him of a liberty interest in due process sufficient to support an action under 42 U.S.C. § 1983. As the District Court noted, however, Petitioner has made no allegation of defamation by any FSU official in the course of the non-renewal of his contract. (Pet. App. pp. 16-17) Nothing in the District Court's opinion conflicts with these decisions, nor do they support Petitioner's due process claim in any respect.

Petitioner has not shown that the District Court and Court of Appeals decisions from which he appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court. In fact, as Respondents have shown, the decisions appealed from are fully consistent with this Court's precedent pertinent to Petitioner's claims. Therefore, the Petition does not merit this Court's grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should decline the petition for certiorari.

MICHAEL F. EASLEY
ATTORNEY GENERAL

Thomas J. Ziko*
Special Deputy Attorney General

Celia Grasty Jones
Associate Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7387

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*Counsel of Record